## Magdalene Grant

**From:** Mary Angel on behalf of Secretary
**Sent:** Tuesday, August 23, 2005 4:52 PM
**To:** Amy Larson; Austin Schmitt; Bruce Dombrowski; Bryant VanBrakle, Chris Hughey; Cory R Cinque; David Miles; Derek O. Scarbrough; Edward L. Lee Jr.; Florence Carr; Frank Schwarz; George A. Quadrino; Harold Creel; Joseph Brennan; Karen Gregory; Lucille A. Streeter; Paul Anderson; Peter King; Rachel Dickon; Rebecca Dye; Rebecca Fenneman; Sandra Kusumoto, Steven D. Najarian; Steven R. Blust; Vern Hill
**Subject:** FW BDP International PRM Comments to FMC Docket 05-05
**Importance:** High
**Attachments:** PRM Comments 8-22-05.doc

**From:** EEdwards [mailto:eedwards@rofgw.com]
**Sent:** Tuesday, August 23, 2005 2:41 PM
**To:** Secretary
**Subject:** BDP International PRM Comments to FMC Docket 05-05
**Importance:** High

Bryant L. VanBrakle, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1046
Washington, D.C. 20573

**Re: BDP International, Inc. Comments to FMC Docket No. 05-05**
**Non-Vessel Operating Common Carrier Service Arrangements**

**Attachment: PRM Comments**

Dear Mr. VanBrakle:
On behalf of our client, BDP International, Inc., we attach hereto, Comments in response to the Federal Maritime Commission Notice of Proposed Rulemaking on Non-Vessel-Operating Common Carrier Service Arrangements, 46 CFR Part 531. The comments are being submitted in Microsoft Word format.

Please kindly acknowledge receipt of this submission.

If you have any questions or require additional information regarding this message, please contact Mr. Carlos Rodriguez, Esq. at 202-973-2999 or by email at rodriguez@rorfgw.com .

Regards,
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**BEFORE THE FEDERAL MARITIME COMMISSION**

**Docket No. 05-05**

**Non-Vessel-Operating Common Carrier Service Arrangements**

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**COMMENTS OF BDP INTERNATIONAL, INC.**

In accordance with the Federal Maritime Commission's ("Commission") Notice of Proposed Rulemaking issued August 3, 2005, BDP International, Inc. (hereinafter "BDP") respectfully submits these comments in response to the Commission's proposed rule that would revise 46 CFR Part 531, Non-Vessel-Operating Common Carrier ("NVOCC") Service Arrangements to allow NVOCC's and shipper's associations with NVOCC members to act as shipper parties in NVOCC Service Arrangements ("NSAs").

BDP, is a closely held corporation owned by the Bolte family of Philadelphia for the last thirty-nine (39) years, is a financially stable company that services importers and exporters globally, and while BDP services all types of shippers, it is primarily focused, and recognized as a leader in providing transport and logistics services to the global chemical industry. BDP was an original Petitioner which resulted in the Commission's rule issued January 19, 2005, that first permitted NVOCCs to offer NVOCC service arrangements to shippers. BDP for the reasons described below supports the proposed rule-making, and states that the proposed rule would not result in substantial reduction in competition or is detrimental to commerce.

## I. POSITION

### 1. *Commission's Exemption Authority.*

Pursuant to Section. 16 of the *Shipping Act of 1984,* 46 U.S.C. app. 1701 et seq. ("Shipping Act") , the Commission has broad authority to grant the exemption from any of the requirements of the Shipping Act as long as the exemption (1) will not result in a substantial reduction in competition or (2) be detrimental to commerce. Section 16 provides:

> The Commission, upon application or on its own motion, made by order or rule exempt for the future any class of agreements between persons subject to this Act or any specified activity of those persons from any requirement of this Act if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.
> 46 U.S.C. App. X 1715 (2003).

Under this authority, the Commission issued a final rule on January 19, 2005 that exempted NVOCCs from certain tariff publication requirements of the Shipping Act. The exemption enabled individual NVOCCs to offer NSAs to NSA shippers provided the NSAs are filed with the Commission and their essential terms are published in the NVOCC's tariff. The definition of NSA shipper for purposes of this provision explicitly excluded NVOCCs and shippers' associations with NVOCC members. The current proposed revisions seek to remove those exclusions by the following:

(a) Deleting of the current language of 46 CFR 531.3(o), and by substituting the following language: "NSA shipper means a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, a shippers' association, or an ocean transportation intermediary, as defined in section 3(17)(B) of the Act, that accepts responsibility for payment of all applicable charges under the NSA."

(b) Amending the final sentence of 46 CFR 531.6(c)(2) to insert the phrase "acting as carrier"

(c) Amending 46 CFR 531.5(a) to insert the phrase "acting as carrier" so as the section would read as follows: "(a) The duty under this part to file NSAs, amendments and notices, and to publish statements of essential terms, shall be upon the NVOCC acting as carrier party to the NSA."

(d) Mirroring provisions of the prohibition of the Shipping Act from concluding contracts with NVOCCs who are not in compliance with the Shipping Act. 46 U.S.C. app. 1709(b)(12).

The Commission seeks comment on whether the proposed rule would or would not result in a substantial reduction in competition or be detrimental to commerce.

2. ***Discussion: BDP Supports the Proposed Rule-making in that the Rule Would not Result in Substantial Reduction in Competition, nor Would it be Detrimental to Commerce.***

**a. The Proposed Rules Will Not be Detrimental to Commerce.**

First of all, NVOs currently deal with each other in co-loading arrangements per the Commission regulations. NVOs extension of their co-loading practices into more formal NSA's will stabilize these practices. These confidential service contracts would ultimately result in better pricing opportunities for shippers in that NVOs, with cargo volume obligations from other NVOs in NSA arrangements, would be able to negotiate more favorable rates and terms with ocean carriers. This would result in BDP, as well as the corresponding NVOs with whom it contracts, offering more competitive pricing and more advantageous service packages for shippers of all sizes. This result would apply to both full container and less-than-container load traffic.

The rationale the Commission utilized in its September, 2001 Study, "The Impact of the Shipping Reform Act of 1998" ("FMC OSRA Report"), applicable to service contracts and the benefits received by carriers and shippers, would equally apply to contractual arrangements between NVOs. In that Study the Commission concluded:

> Overall, the responses reflect that confidentiality under OSRA has provided shippers and carriers with the privacy they deem necessary to freely transact business. With the ability to shield such information, the contracting process is not constrained by the previous standards of meeting benchmarks and matching terms identically. Commercially sensitive issues and business requirements can be discussed more freely and accommodated more easily with specific contract terms. Carriers and shippers are more focused on achieving their individual rate and business objectives through contract negotiations

(FMC OSRA Report, at 33-34).

It clearly would be beneficial to ocean commerce for BDP to have the ability to provide contract terms for a myriad of services, including ocean transportation, as an all-inclusive source of obligating BDP, and other NVOs, as shippers, over the entire door-to-door route of a shipment. The co-loading arrangements, especially those termed *carrier-to-shipper* in a tariff context, aside from the issue that they are not confidential, would be strained, difficult, if not impossible to structure in a tariff format. The efficiencies of confidential contracting for total transport packages are not currently possible in contract format between NVOs, but these will result in benefits to the NVOs as well as the underlying shippers.

The impact of these new modifications to NSA are patently not detrimental to commerce at any level, and in fact will result in benefits to commerce as discussed herein.

**2. Extending the Exemption to NVOs as Shippers and Shipper Associations with NVO Members Will Not Substantially Reduce Competition.**

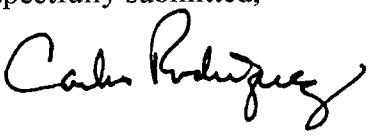
Section 16 of the Shipping Act requires that the proposed exemption (and modifications per the proposed rule-making) not be detrimental to commerce, but it also requires that granting of the Exemption (proposed rules) not result in the substantial reduction of competition. The proposed rules would meet this requirement by

stimulating competition at many levels of the international transportation industry. As indicated above, the reality of the matter is that NVOs currently deal with each other commercially creating many mutual benefits in many different environments through the co-loading process, whether it be on a *carrier-to-carrier* or *carrier-to-shipper* basis. NVOs through the existing marketplace have brought about NVO "partnerships" in the co-load environment that allow for keener competition among all industry segments. The *carrier-to-shipper* NVO relationships which have naturally proliferated in the marketplace will now evolve into more competitive relationships in a confidential NSA environment. NVOs will deal with each other on a carrier/shipper basis with greater flexibility than the tariff-based structures currently allows. The documentation regulatory ambiguities of *carrier-to-carrier* relationships also becomes moot in the context of NSAs between NVOs. Confidentiality is the key for creating a more positive and competitive environment among NVOs. In a sense, the same confidentiality that spurs competition in the ocean carrier/shipper environment in service contracts will now impact on the NVO (as carrier)/NVO (as shipper) environment. As noted above, the rationale the Commission utilized in its "FMC OSRA Report" applies equally well when considering the competitive impact of the "confidentiality" aspect of the proposed regulations. The Report concludes that, "[w]ith the ability to shield such information, the contracting process is not constrained by the previous standards of meeting benchmarks and matching terms identically." In short, competition will flourish based on real commercial factors and not on the basis of transparencies of the tariff mechanism.

## II. CONCLUSION

In conclusion, implementation of the proposed rules would not result in either the reduction of competition nor would it be detrimental to commerce.

Respectfully submitted,



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Dated: August 23, 2005